SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDICTMENT—Filed August 20, 1940

SOUTHERN DISTRICT OF NEW YORK, ss:

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oath present:

That heretofore, to wit, from on or about the 1st day of July, 1936, and continuously thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, Samuel H. Feldman, hereinafter referred to as the defendant, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud two classes of persons, both of which are hereinafter sometimes referred to as the "persons to be defrauded", the first of said [fol. 3] classes being too numerous to mention specifically herein, and being made up of persons, firms, corporations, banks and trust companies, who would give moneys, funds, property, credit and capital in exchange for checks and drafts which they would receive from defendant as herein indicated, among whom were the 58-59 Realty Corporation, hereinafter referred to as the Essex House, The National City Bank of New York, the Chemical Bank & Trust Company, the Bank of the Manhattan Company, Fenner & Beane, Harriman & Keech, H. Hentz & Co., Munds, Winslow & Potter and William Erb; and the second of said classes being those who would sign checks in blank and deliver the same to said defendant, among whom were one Edwin S. Reynolds and other persons to the Grand Jurors unknown, said scheme and artifice to defraud being carried out by the means and in the manner hereinafter described.

(1) It was a part of said scheme and artifice to defraud that in or about August, 1936, defendant would open and cause to be opened a bank account in the First National Bank, Petoskey, Michigan, in the name of J. Feldman, said bank being hereinafter sometimes referred to as the "Petoskey Bank".

(2) It was further a part of said scheme and artifice to defraud that from time to time throughout the period set forth in this indictment defendant would obtain and have in his possession numerous blank checks upon said Petoskey Bank, signed "J. Feldman" and blank checks upon other banks and trust companies signed by other persons to the Grand Jurors unknown, and would insert the names of payees and amounts in said checks.

[fol. 4] (3) It was further a part of said scheme and artifice to defraud that throughout the period set forth in this indictment defendant would cash and cause to be cashed by presenting and causing to be presented to the Essex House, the National City Bank of New York, and to others to the Grand Jurors unknown, checks drawn on said Petoskey Bank signed "J. Feldman", knowing at the time that said checks were presented that there were insufficient funds on deposit in the J. Feldman account at the Petoskey Bank to pay said checks, and knowing at such times that he and J. Feldman were without funds or power to pay said checks when the same would be presented for payment.

(4) It was further a part of said scheme and artifice to defraud that defendant would cause said checks drawn on the J. Feldman account at the Petoskey Bank to be forwarded by mail to the Federal Reserve Bank, Chicago, Illinois, and from there by mail to the Petoskey Bank, defendant well knowing that it would take approximately four days for said checks to be transmitted in said manner from New York City to the Petoskey Bank.

(5) It was further a part of said scheme and artifice to defraud that defendant would almost daily throughout the period of time set forth in this indictment cash by presenting and causing to be presented at the Essex House, National City Bank of New York, and to the persons to be defrauded, additional checks in increasing sizes and would send and cause to be sent through the Western Union Telegraph Company to Petoskey, Michigan, certain of the proceeds of said additional checks to meet and pay checks previously drawn on said J. Feldman account in the [fol. 5] Petoskey Bank and previously cashed by defendant.

(6) It was further a part of said scheme and artifice to defraud that in order to obtain funds to pay certain of the

aforesaid checks drawn on the J. Feldman account in the Petoskey Bank which checks were protested and returned by said bank, defendant would secure additional bank checks signed "E. S. Reynolds", drawn on the Winters National Bank & Trust Company, Dayton, Ohio, hereinafter referred to as the Winters Bank, and would insert the amounts and the names of the payees and would cash said additional checks by presenting and causing the same to be presented to certain of the persons to be defrauded, knowing at all of said times that there were insufficient funds in said account of E. S. Reynolds in said Winters Bank to pay said additional checks, and knowing that he and E. S. Reynolds were without sufficient funds and power to pay said additional checks when the same would be presented for payment.

(7) It was further a part of said scheme and artifice to defraud that defendant by presenting and causing to be presented to the persons to be defrauded the aforesaid checks, drawn on the J. Feldman account in the Petoskey Bank, and the checks drawn on the E. S. Reynolds account in the Winters Bank, and by immediately cashing the same, or drawing cash against the same, would represent to the persons to be defrauded that there were sufficient funds to meet and pay said checks in said accounts, whereas in truth and in fact, said defendant then and there well knew that there were at all times set forth in this indictment insufficient funds on deposit in said accounts to pay said checks, [fol. 6] and said defendant intended by such false and fraudulent representations, pretenses and promises to deceive and defraud the persons to be defrauded, and to induce them to part with their moneys and funds, it being the plan and purpose of said defendant to obtain said moneys and funds of said persons to be defrauded, and to convert and appropriate the same to his own profit and use in proportions to the Grand Jurors unknown.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore, to wit, on or about the 20th day of August, 1937, in the Borough of Manhattan, in the City, State and Southern District of New York and within the jurisdiction of this Court, Samuel H. Feldman, the defendant herein, unlawfully, wilfully and knowingly did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the

Post Office Establishment of the United States, a certain check drawn to the order of Essex House, signed "J. Feldman", in the amount of $2,000, dated August 19, 1937, and enclosed in a postpaid envelope, addressed to: Federal Reserve Bank, Chicago, Illinois, a fuller and more complete description of said envelope being to the Grand Jurors unknown; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

[fol. 7] Third Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if [fol. 8] herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 21st day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "J. Feldman" on the First National Bank, Petoskey, Michigan, made payable to the order of "Essex House" in the amount of $2000.00, dated August 20, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank, Chicago, Illinois: against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

. . . . . .

[fol. 9] Fifth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the

first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that for the purpose of executing said scheme and artifice to defraud and attempting so to [fol. 10] do, the defendant, at the City, County, State and Southern District of New York and within the jurisdiction of this Court, on or about the 23rd day of August, 1937, unlawfully, wilfully and knowingly did take and receive from the mail delivered by the Post Office Establishment of the United States, certain ten checks drawn on the Winters National Bank and Trust Co., Dayton, Ohio, and signed in blank "E. S. Reynolds" and enclosed in a postpaid envelope addressed to: Mr. Sam Feldman, Essex House, 59th Street, New York City; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title 18, Section 338, United States Code).

Sixth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 25th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, [fol. 11] wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds" on The Winters National Bank & Trust Co. made payable to the order of "Sam H. Feldman" in the amount of $10,000.00, dated August 24, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

Seventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 27th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and [fol. 12] delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds" on The Winters National Bank & Trust Co. made payable to the order of "Sam H. Feldman" in the amount of $10,000.00, dated August 27th, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

Eighth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 26th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds"

[fol. 13] on The Winters National Bank & Trust Co. made payable to the order of "Sam Feldman" in the amount of $6000.00, dated August 25th, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank of Cleveland, Cincinnati Branch, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

Ninth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do hereby reaffirm, reallege and incorporate as if herein set forth in full, each and every allegation of the first count of this indictment, except those allegations contained in the last paragraph thereof.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that for the purpose of executing said scheme and artifice to defraud and attempting so to do, heretofore and on or about the 28th day of August, 1937, in the Borough of Manhattan, City, County, State and Southern District of New York, and within the jurisdiction of this Court, the defendant herein, unlawfully, wilfully and knowingly, did place and cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a check signed "E. S. Reynolds" on the Winters National Bank & Trust Co. made payable to the order of "Sam H. Feldman" in [fols. 14-19] the amount of $6000.00 dated August 26th, 1937, enclosed in a postpaid envelope addressed to: Federal Reserve Bank of Cleveland, Cincinnati Branch, Cincinnati, Ohio; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 338, United States Code).

John T. Cahill, United States Attorney.

[fol. 20] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

SAMUEL H. FELDMAN

C. 108/159. Violation of U.S.C. Title 18 Secs. 338. Using the mails in a scheme to defraud.

JUDGMENT AND COMMITMENT

On this 9th day of July 1942, upon the proceedings heretofore had herein and on motion of the United States Attorney, it is by the Court

Ordered and adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of five years on each of counts 1-3-5-6-8 to run concurrently with each other.

Five years each on counts 7 and 9. Execution of sentence on counts 7 and 9 suspended. Probation for five years on counts 7 and 9 to begin after service of sentence on counts 1-3-5-6-8, subject to the standing probation order of this court.

[fol. 21] It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Bascom S. Deaver, United States District Judge.
(Seal.)

A true copy. Certified this 9th day of July 1942.
George S. Tollmen, Clerk.

[fols. 22-1233] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C. 108-159

UNITED STATES OF AMERICA

vs.

SAMUEL H. FELDMAN

Bill of Exceptions

Before Hon. Bascom S. Deaver, D. J., and a Jury

New York, June 22, 1942; 10:30 a. m.

APPEARANCES:

Mathias F. Correa, Esq., United States Attorney, for the Government; Walter H. Gahagan, Jr., Esq., and Amedeo L. Lauritano, Esq., of Counsel.

Seymour M. Klein, Esq., Attorney for Defendant; Ruth Rosenthal, Esq., of Counsel.

* * * * * * *

[fols. 1234-1462] New York, July 6, 1942; 9:30 a. m.

Trial Resumed

COLLOQUY IN CHAMBERS BETWEEN COURT AND COUNSEL

(The following occurred in chambers between Court and Counsel out of the presence of the jury.)

Mr. Klein: I would like to object to the admission of the Government's exhibits, some of which have been marked and some of which have not been marked, which the Government is about to offer in evidence, consisting of the supplementary proceedings in which Mr. Feldman was examined as a judgment debtor at various times.

I would like to object to their admission on the ground that they are incompetent, irrelevant and immaterial, not within the scope of this indictment and not binding on the defendant, and are also a violation of the defendant's constitutional rights in that the examination was compulsory.

I would also like to point out in addition to my objection which I have just mentioned—

The Court: I might say with reference to your objection to the papers as a whole that the objection is overruled because some of it is admissible, and there may be some that is not. You may point out any special points you want to object to specially.

Mr. Klein: I understand that your Honor is ruling on the general admissibility of these examinations as a whole, and my objection goes to the whole?

The Court: Yes; that is right.

* * * * * * *

[fol. 1463] ARGUMENTS INTERJECTED DURING GOVERNMENT'S SUMMATION

(Mr. Gahagan continued his summation, during the course of which the following occurred:)

"You are making me look like a burglar."

Mr. Klein: Now may the record show the exact portion which Mr. Gahagan read to the jury.

Mr. Gahagan: Exhibit 102-D.

Mr. Klein: Mr. Stenographer, when you have time would you mind just copying that part read into the record.

Mr. Gahagan: Make it all of Exhibit 102-D.

[fol. 1464] Mr. Klein: No, you didn't. I am talking about the stress being laid on this portion. I am talking about the part starting with the words "It is the same kind of checks" down to the word "burglar." I object to that and I move your Honor to strike it out of the record.

The Court: Motion denied.

Mr. Klein: Exception, please. Thank you.

(The portion referred to by Mr. Klein above is as follows:

"Q. It is the same kind of checks that you have been kiting?

"A. I object to that.

"Q. Didn't you use the word 'kiting'? Didn't you yourself use the word?

"A. That is the real term for it, but I don't recall using the word. If that is what you want, all right. You should not be so nasty. You are making me look like a burglar.")

(Mr. Gahagan continued his summation, during the course of which the following occurred:)

There is no question about it; he has a right to refuse to answer. That is the law.

Mr. Klein: I object to that. The District Attorney is misstating the law of the State of New York. This man has to testify in supplementary proceedings.

The Court: Let us not have any misunderstanding about that and may I say just to prevent such a misunderstanding that sometimes you refer to the law of New York and sometimes to the Federal Constitution. Now your point is, I take it, that use of the supplementary proceedings during the trial would be in violation of the Federal Constitution. What the District Attorney is saying applies to the Federal [fol. 1465] Constitution, and what he says is that he has a right under the Federal Constitution not to answer. Then it would be immaterial what the State Law or what the State Constitution has to say about it.

Mr. Klein: The District Attorney is inferring that this man could have refused to answer questions before the Supreme Court of the State of New York.

The Court: Absolutely, if you are correct about having a Federal constitutional right. If you are correct he could absolutely before any court or anywhere else in the whole United States claim his privilege and refuse to answer.

Mr. Klein: I ask your Honor to charge—but first I except to your Honor's statement—that under the laws of the State of New York this man would have to answer questions in the State of New York courts and that he would have no choice.

The Court: I think I have made it clear to the jury that so far as the law of the State of New York is concerned it may require him to answer, but the Federal Constitution is controlling. The Federal Constitution is controlling over all State laws and if there were a right under the Federal Constitution not to answer these questions then he could refuse to answer not on the ground that the New York Law does not force him to do it but on the ground that the Federal Constitution gives him a right not to answer.

Mr. Klein: Just to make my point clear, sir, I except to your Honor's statement upon the ground that the District Attorney has tried to infer here that under the Federal Constitution this man could refuse to answer questions in

the State of New York; whereas under the statute of the [fols. 1466-1577] State of New York this man must answer the questions and that testimony may not be used against him. And I ask your Honor to so state in view of what your Honor's statements have been.

The Court: No, I state to the contrary, that if there were a Federal right under the Federal Constitution not to answer he would not be required to answer anywhere.

Mr. Klein: Even in the State of New York?

The Court: Anywhere.

Mr. Klein: I respectfully except.

* * * * * * *

[fol. 1578] GOVERNMENT'S EXHIBIT 85

CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

58-59 REALTY CORPORATION, Judgment Creditor,

against

SAM FELDMAN, Judgment Debtor

SAMUEL HARRY FELDMAN appearing this 31st day of March, 1936 for examination in proceedings supplementary to execution pursuant to subpoena heretofore served upon him, first being duly sworn true answers to make to all questions put to him, testifies as follows:

Examination by Mr. A. Edward Moskowitz, Attorney for Judgment Creditor:

Q. What is your full name? Samuel Harry Feldman.

Q. Where do you reside? At the Hotel Navarre, 112 Central Park South.

Q. Are you employed? No.

Q. Do you have a business of your own? No.

Q. Do you have a safe deposit vault? No.

Q. Have you a bank account, savings or checking? Yes, a personal checking account.

Q. In what bank? Emmet County State Bank.

Q. What is your balance? About $6.00.

[fol. 1579] Q. Has it been any higher than that in the last year? No.

Q. Have you made any deposits? Yes, by mail and withdrawals made at the same time.

Q. How much rent do you pay? $225.00 per month.

Q. You have an independent income? None.

Q. Do you pay this rent yourself? I do.

Q. Where do you receive the money from? From my family.

Q. Where does your family live? Petoskey, Michigan.

Q. What is your father's name? Joe Feldman.

Q. He sends you money to pay your rent? I get it from many members of my family.

Q. They all reside outside of New York? They live in different states, nobody in New York.

Q. Do you own any stocks, bonds or securities? None.

Q. Are you an officer or director of any corporation? No.

Q. Member of any lodges? Yes, Elks, K. P., Masons, American Legion and Shriners.

Q. Are your dues all paid? No, I haven't paid dues for five years.

Q. Member of any of the clubs in the City? None.

Q. When were you last employed? Never been employed.

Q. When did you last earn any money? 3½ months ago.

Q. Are there any other judgments against you? Many.

Q. How much is the total amount? $150,000.

Q. Have you ever filed a petition in bankruptcy? Never.

Q. Have you paid off on any of these judgments? I [fols. 1580-1587] have made settlements of a lot of them in the past few years, none by payments.

Q. Have you any money with which to pay this judgment? No.

Q. Do you expect to be employed now? No.

Q. When you make any money, in what manner do you earn it? Selling furs as commission agent.

Sam Harry Feldman.

Sworn to before me this 31st day of March, 1936.

——— ———.

[fol. 1588] GOVERNMENT'S EXHIBIT 95

Examination of SAMUEL H. FELDMAN in supplementary proceedings continued on the 16th day of December, 1938, at the office of Shirley Zuckerman, Notary Public, Room

2900, 295 Madison Avenue, New York City. (Same appearances)

By Mr. Nulman:

Q. You have read your prior examination consisting of six typewritten pages, and have made certain changes therein which you have initialed,—is that right?

A. Yes.

Q. And do you swear that those answers are true?

A. Yes.

Q. You have testified previously that the only source of your income is your father, who sends you all the money you require and use for your needs,—is that correct?

A. No, I get great assistance from my father, but I borrow money from some of my family.

* * * * * * *

Q. Is it a fact that you have been subsisting entirely of moneys sent you by your father?

A. Of late, yes.

Q. When you say of late, what period of time does that cover?

A. Within the last year and a half.

Q. Would it be two years?

A. Maybe.

Q. Would it include the entire period when you were resident at the Essex House and Navorro Hotel?

A. No, because I was making money up until about two years ago.

* * * * * * *

Q. But the money you used to pay your expenses at the Navorro Hotel for the past year or so was from your father?

A. Practically.

Q. And that money is given to you by your father,—is [fol. 1589] that correct?

A. I wouldn't say given to me; I hope sometime to be successful and repay him.

Q. Do you ever give your father money of any kind?

A. Nothing.

Q. Have you within the past three or four years sent any money of any kind to your father?

A. I might have helped him out in many years back.

Q. I am talking of the time within the last three or four years.

A. I don't remember.

Q. Within the last two years did you send any money to your father?

A. I don't think so.

Q. Your father sends you money drawn on what bank?

A. First National Bank of Petosky, Michigan.

Q. Do you make any deposits in that bank in your father's account?

A. I do not.

Q. Have you ever made any deposits in that account?

A. Never.

Q. Have you ever sent your father the funds with which to maintain that account?

A. Never.

Q. Can you approximate how much money your father has given you of his own funds in the past year?

A. I should judge three thousand dollars.

Q. In the past year?

A. In the past year, year and a half.

Q. If I were to tell you that the records of your expenditures exceed three thousand dollars, will you change your answer?

A. No. Because many times people in my apartment order up food and give me the money to pay it.

Q. Do you maintain in your own name any brokerage account at the present time, in any brokerage house whatsoever?

A. No.

Q. Do you maintain at the present time any brokerage [fol. 1590] account in any brokerage house whatsoever under any name?

A. None.

Q. Have you a beneficial interest in any brokerage account of any kind whatsoever?

A. I have no account to derive benefit from.

Q. Have you an equity, whether by way of participation or to have somebody act on your behalf, or have you an interest of any kind whatsoever in any brokerage account?

A. None.

Q. Did you ever maintain a brokerage account under any other name but your own?

A. Under the name of Mr. Little.

Q. When was that?

A. About three years ago.

Q. With what house?

A. Harriman & Keech. They are out of business for sometime.

Q. Was that the last brokerage account you were interested in?

A. Yes.

Q. Financially or otherwise?

A. The last account I have ever had.

. . . . . .

Q. Did you, between the last time you were examined by me and today, have any money of any kind?

A. Probably twenty-five or fifty dollars, to live on.

Q. Where did you get it from?

A. My father gave it to me when he was here.

[fol. 1591] Q. Did you spend it?

A. I have been going very carefully. I still have about ten dollars left.

. . . . . .

Sam H. Feldman.

Sworn to before me this 26 day of October, 1939. Charlotte Feinstein, Commissioner of Deeds, City of New York, N. Y. Co. Clk. No. 22, Reg. No. 9-F-0, Bronx Co. Clk. No. 1, Reg. No. 40-F-1. Term expires Feb. 15, 1940.

Examination of SAMUEL H. FELDMAN in supplementary proceedings continued on the 20th day of July, 1939, at Special Term, Part II, Supreme Court, New York County, at 2:00 P. M. (Same appearances)

By Mr. Nulman:

. . . . . .

Q. When did you return from Florida?

A. About the middle of April.

Q. 1939?

A. 1939.

Q. Where did you stay when you were in Florida?
A. At El Mirasol Apartments.
Q. What is the address?
A. 28th Street.
Q. Where?
A. Miami Beach.
Q. Did you occupy an apartment there?
A. I occupied a room.
Q. And what was the rental?
A. I didn't pay the rent.
[fol. 1592] Q. Was that room part of a suite?
A. It was part of an office.
Q. Whose office was it?
A. Stout & Company.
Q. Where did you sleep?
A. Right in that room.
Q. What sort of a room was that?
A. Just a room with twin beds.
Q. And who paid the rent for that room?
A. It was given to me gratis.
Q. By whom?
A. By Stout & Company.
Q. Who in Stout & Company gave that?
A. The firm.
Q. Who?
A. Mr. Hutton Miller and Mr. Goetz.
Q. What is the address of this firm?
A. El Mirasol Apartments. 28th Street. The two partners have since severed connections.

. . . . . .

Q. Who paid for your meals while you were in Florida?
A. The firm paid all my expenses down there.
Q. Which firm do you refer to?
A. Stout & Company.
Q. Were you employed by them?
A. I was not.
Q. Did you have any arrangement with them under which they paid for your room and board?
A. I was there as a friend of Mr. Miller's.
Q. Mr. Feldman, Do you now either directly or indirectly have any interest in any brokerage accounts of any kind whatsoever?
A. None whatsoever.

Q. Did you at any time prior to today, either directly or indirectly, have any interest of any kind whatsoever in any brokerage account of any other person or corporation?

A. Yes.

. . . . . .

Q. When was the last time that you were interested, either directly or indirectly, in the brokerage account of [fol. 1593] any other person or corporation?

A. About two years ago.

Q. And whose account was that?

A. It was Mr. J. F. Little.

Q. Where does Mr. Little live?

A. On Amsterdam Avenue. You can look in the book, J. L. Little.

Q. Didn't you just say J. F. Little?

A. It's either J. F. or J. L.

Q. What brokerage house was that?

A. I had that account with Harriman & Keech.

Q. What branch?

A. The main branch.

Q. Where?

A. I don't know where they were located.

Q. Where did you have the account?

A. Where I did business with them? At the Savoy Plaza Hotel.

Q. What other stock brokerage houses did you have accounts with?

A. None.

. . . . . .

Q. Were there any other accounts in which you had an equity or interest of any kind whatsoever?

A. Not to my recollection.

. . . . . .

Q. Did you have any business transactions of any kind while you were in Florida from January 1st until you returned to New York City?

A. None whatsoever.

Q. Didn't you just tell Judge Leary a few minutes ago that you went there in the hopes of doing business, selling furs?

A. Yes, but I was unsuccessful. I sold no furs.

Q. Did you have any furs to sell?

A. I had entry to all the furs I could get, if I had customers.

Q. To whom do you have entry?

A. I could go to anybody as long as I got customers.

[fol. 1594] Q. Who specifically could you go to?

A. None particularly. Anybody.

Q. When was the last time that you got money of any kind from anybody?

A. A long time; I don't recall.

Q. About how long ago?

A. Way long ago. To the best of my recollection, probably a year or so, maybe longer.

Q. Do I understand you correctly to tell me that you have not received money of any kind from any source for a period of a year?

A. Outside of help.

Q. What help did you get, when, and from whom?

A. Most of my help was from different members of my family.

. . . . . .

Q. Have you ever sent money to anybody for the purpose of being deposited by them in J. Feldman's account of Petosky, Michigan?

A. Not for quite some time.

Q. When was the last time you did that?

A. I should judge within two years.

Q. How long ago was the last time that you did that?

A. I just said I think about two years.

Q. In other words for approximately two years you tell me you have not sent any money to anybody in Petosky?

A. There might have been money sent to Petosky by other people, or maybe I was there and maybe my name was used, but it had nothing to do with me as to moneys I had.

Q. When was the last time anybody sent any money to Petosky to be deposited in J. Feldman's account?

A. I think money was sent to Petosky when my father was in the City.

Q. By whom?

A. By J. Feldman: He probably came to the place. [fol. 1595] Maybe it was sent by me, but J. Feldman sent it. He might have put my name on it.

Q. Have you ever within the last two months sent money to the bank in Petosky for deposit with them in the account of J. Feldman?

A. Never.

Q. Do you know of any other person who sent money to the bank at Petosky or to any other person for deposit in the bank at Petosky.

A. No.

Q. What did you mean when you told me that money was sent to the bank?

A. You just asked me a question and I told you that J. Feldman sent money to his own account. Maybe he sold furs and had the money and wanted to wire it. Those things I am not familiar with. You asked me if I sent money, and I said no.

Q. Have you ever asked persons you were doing business with to send money to the bank in Petosky?

A. No.

Q. Have you ever asked people you were doing business with to send money to persons in Petosky?

A. No.

Q. Have you ever sent checks to Petosky?

A. No.

Q. Have you ever sent checks to any person or to any bank in Petosky?

A. Never.

Q. Have you ever caused any checks to be sent to Petosky, Michigan for deposit in the bank at Petosky?

A. No.

. . . . . .

Q. Have you ever cashed a check in New York City drawn on the bank in Petosky, Michigan?

A. Issued by who?

Q. By anybody?

A. Yes

Q. How long ago?

A. I used to cash several checks.

Q. How long ago did you cash the last check?

A. Over two years ago.

[fol. 1596] Q. Have you cashed any checks since that time?
A. Not to my recollection.

* * * * * * *

Examination adjourned.

Sam H. Feldman.

Sworn to before me this 26 day of October, 1939. Charlotte Feinstein, Commissioner of Deeds, City of New York. N. Y. Co. Clk. No. 22, Reg. No. 9-F-0, Bronx Co. Clk. No. 1, Reg. No. 40-F-1. Term expires Feb. 15, 1940.

[fol. 1597] GOVERNMENT'S EXHIBIT 95-A

SUPREME COURT

NEW YORK COUNTY

In the Matter of Supplementary Proceedings

SELMA MOYER, Judgment Creditor,

against

SAMUEL H. FELDMAN, also known as S. H. FELDMAN, Judgment Debtor

Appearances:

Shaine & Weinrib, Attorneys for Plaintiff, Judgment Creditor by Kalman I. Nulman, of Counsel; Paul Grainsky, Attorney for Defendant, Judgment Debtor; Samuel H. Feldman, Judgment Debtor.

It is hereby stipulated by counsel for both parties that the following examination in supplementary proceedings may be taken before Shirley Zuckerman, a Notary Public, with the same force and effect as if taken before the Clerk of the Court, and may be sworn to before a notary public or commissioner of deeds with the same force and effect as if sworn to before the Court.

Examination in supplementary proceedings of Samuel H. Feldman, also known as S. H. Feldman, pursuant to sub-
[fol. 1598] poena therefor duly served upon him, dated September 1st, 1938, and various stipulations of adjourn-

ment, at the office of Shirley Zuckerman, Notary Public, Room 2900, 295 Madison Avenue, New York City, on the 6th day of October, 1938, at 4 P.M. after being duly sworn, testifies as follows:—

Q. Where do you live, Mr. Feldman?

A. Hotel Navarro, 112 Central Park South, New York City.

Q. You are the judgment debtor in this proceeding?

A. Yes.

Q. Are you engaged in business?

A. I am.

Q. What business?

A. Fur business.

Q. Have you a place of business?

A. I make my headquarters in my apartment.

Q. How large an apartment do you have?

A. Two rooms.

Q. What is the monthly rental?

A. $225 a month.

Q. And you pay that?

A. I don't, my father pays it.

Q. Where is your father?

A. In Petosky, Michigan.

Q. How does he pay it?

A. Pays it by his own personal checks. Sends checks to the Hotel directly.

Q. Are the checks made payable to you?

A. They are made payable to me, or to the hotel, or to cash.

Q. He remits monthly?

A. No, sometimes he is not in a position to.

Q. On the average, how often do these payments come in to you from your father?

A. On the average of once or twice a month.

Q. Approximately how much is the average payment?

A. Around $60 a week.

Q. What is your father's full name and address?

A. Joseph Feldman, Hide, fur and wool business, Petosky, Mich.

[fol. 1599] Q. Have you a bank account?

A. I have none.

Q. When did you last have a bank account?

A. About six years ago.

Q. Where did you have your bank account?
A. Harbor Springs, Michigan.
Q. Ever have a bank account in New York?
A. Never.
Q. Ever have a savings account in New York?
A. Never.
Q. Do you now maintain a brokerage account in New York?
A. I have none.
Q. When did you last have a brokerage account?
A. 2½ or 3 years ago.
Q. With whom?
A. Harrison & Keech, Savoy Plaza Hotel Branch, New York City.
Q. Did you ever maintain any other accounts in New York?
A. Not in many years.
Q. Do you have the names of any other brokerage accounts in New York?
A. Yes.
Q. So that outside of this brokerage account you maintained with Harriman & Keech, you had no other brokerage accounts of any kind maintained anywhere in New York City?
A. Yes I did by the name of Little.
Q. When did you come to New York?
A. 15 or 17 years ago, I don't remember which.
Q. What is the nature of your business?
A. Selling my father's raw furs which he ships into the city. Also selling manufactured products to individual customers.
Q. You are what is called a fur broker?
A. Right.
Q. Who are some of the customers you do business with?
A. Orlan Fur Corp. 27th Street, Fishman & Greenfield, 224 West 30th Street, and A. Walzer & Sons, 330—7th Avenue.
Q. Any others?
A. Not recently.
[fol. 1600] Q. Do you have any outstanding accounts?
A. Nothing.
Q. Are there any moneys due from customers to you?
A. Haven't been able to do any business for eight months.

Q. In other words, do I understand that you haven't been able to do any business for eight months?

A. Right.

Q. Mr. Feldman, when did your father last remit to you?

A. Monday. He remitted to the hotel.

Q. How much did he remit?

A. $500.

Q. Was it by cash or check?

A. Check.

Q. Made payable to whom?

A. Made payable to Navarro Hotel (cash), to the best of my recollection.

Q. Did you cash that check?

A. No, gave them check on account. The Hotel got it.

Q. Was that check mailed to you?

A The check was mailed to the hotel.

Q. By your father?

A. Yes.

Q. Did you at any time see the check?

A. I saw the check and I put the word cash in parenthesis there because they wanted the check payable to cash.

Q. To whom was the check issued?

A. To the Navarro Hotel.

Q. And who at the Navarro Hotel received it?

A. I don't know, it was given right at the desk there.

Q. Who requested you to insert the word cash on the check?

A. One of the clerks.

Q. And you say that at the time you did so the name Navarro Hotel was already inserted?

A. The check was made out to the Navarro Hotel.

Q. Were the words Navarro Hotel in your handwriting?

A. No.

Q. Was there any other writing on that check?

A. The word cash.

[fol. 1601] Q. Outside of the word cash, there was nothing on the check in your handwriting?

A. No.

Q. And it was for $500?

A. Yes.

Q. When was the last check received from your father?

A. I don't remember.

Q. Approximately how long before this last check, did your father remit to you?
A. I don't even know.
Q. Do you know for how much the last check was?
A. No.
Q. You have no idea?
A. The last check I saw was the $500 check Monday.
Q. Do you maintain an account with your father?
A. No.
Q. Do you maintain any staff at your household?
A. No.
Q. Have you ever maintained a staff at your household?
A. No.
Q. Ever employ a cook or maid?
A. No.
Q. Do you employ anybody in your business?
A. No.
Q. Have you ever employed anybody in your business?
A. Never.
Q. When did you last collect any outstanding accounts from your customers?
A. Last December.
Q. From whom and how much?
A. I don't remember.
Q. Do you maintain a set of books?
A. No.

. . . . . .

Q. Have you sold furs to any private individuals within the last year?
A. No.
Q. When was the last time you made a sale of furs to a private individual?
A. Just before I went to Florida.

. . . . . .

[fol. 1602] Q. Do you own an automobile?
A. No.
Q. Have you ever owned one?
A. About 7 or 8 years ago.

. . . . . .

Q. Is there anybody who owes you money?
A. Nobody.

. . . . . .

Q. Are these remittances from your father to you in the nature of commissions earned?

A. Loans.

Q. Do you keep an account of the moneys your father loans you?

A. No.

Q. Did you execute notes to your father for these amounts?

A. No.

Q. Did you request that your father send any specific sums to you?

A. I asked him for plenty, and he sends me what he wants to. Sometimes I don't get any money for two or three months from him.

Q. Have you a lease at the Navarro Hotel?

A. No.

Q. Pay on a month to month basis?

A. Yes.

Q. How much in arrears are you?

A. About six weeks.

Q. You pay weekly?

A. Pay whenever I can.

Q. When you are supposed to pay?

A. Weekly for sundry accounts and monthly for rent.

Q. How much does your sundry account amount to each week?

A. About $15 or $20 a week, (underscoring ours)

Q. So that your total charges at the Navarro Hotel amount to about $300 a month?

A. I should judge about that.

Q. How long have you lived at the Navarro Hotel?

A. About eight months.

[fol. 1603] Q. During that time I assume that the charges have been constant?

A. About the same thing.

Q. In addition to that, you buy your own clothes?

A. No.

Q. You don't?

A. No. I get them in Petoskey, Mich.

Q. How often do you go there?

A. About 3 or 4 times a year.

Q. Do you have any charge accounts in New York?

A. I have none.

Q. Where did you live prior to the time you lived at the Navarro Hotel?
A. Essex House.
Q. How long did you live there?
A. Several years.
Q. How much was the rent there?
A. $225 or $250, it was seasonal.
Q. What was the rent of the apartment?
A. About $225.
Q. What was the maximum rent for the apartment?
A. $250.
Q. You maintained a sundry account there too?
A. Yes.
Q. How much did that amount to?
A. About $30 or $40 a week.
Examination adjourned.

Samuel H. Feldman.

Sworn to before me this 16th day of December, 1938. Charlotte Feinstein, Commissioner of Deeds, City of New York, N. Y. Co. Clk. No. 22, Reg. No. 9-F-0, Bronx Co. Clk. No. 1, Reg. No. 40-F-1. Term expires Feb. 15, 1940.

[fol. 1604] GOVERNMENT'S EXHIBIT 95-B

Examination of SAMUEL H. FELDMAN in supplementary proceedings continued on the 29th day of September, 1939, at Special Term, Part II, Supreme Court, New York County, at 2:00 P. M. (same appearances)

By Mr. Nulman:

* * * * * * *

Q. At any rate, that check and all other checks to the Hotel Novarro were drawn on the bank in Petosky by J. Feldman?
A. Right.
Q. Is he your father?
A. Right.
Q. What is his address?
A. 413 Michigan Avenue, Petosky, Michigan.

Q. And those funds are not your funds, are they?

A. No.

Q. When you say "no", you mean that I am correct that they are not your funds?

A. Absolutely.

Q. Those are your father's funds?

A. Yes.

Q. And every check he sends you represents his own funds?

A. Or money he might get from his own family.

Q. But they are not moneys that you have previously given to him,—is that correct?

A. Correct.

Q. And that is the sole source of your income?

A. At the present time.

Q. You have previously testified it was at all times?

A. I may do something in the future.

Q. I am asking you now, isn't that what your previous testimony was, that each time I interrogated you, you stated that was the sole source of your income?

A. Correct.

Q. So that for the entire duration of this examination, which is approximately a year and a half, or thereabouts, [fol. 1605] that has been the sole source of your income?

A. I don't recall that. I told you as time went along what my income was. The records will show it. I have no record of anything at the present time.

Q. Isn't it a fact that on each of the prior occasions when you were interrogated by me for this period, that you told me the sole source of your funds was sent by J. Feldman?

A. I don't remember; it's been too long.

Q. When did you last buy clothes?

A. Two years ago.

Q. Where did you buy it?

A. In Petosky.

Q. And that was paid for by your father?

A. Yes.

Q. With checks drawn by him?

A. I don't know how it was paid.

Q. What is the name of the bank in Petosky on which the checks sent by J. Feldman to the Hotel Novarro are drawn?

A. First National Bank.

Q. Is that the First National Bank of Petosky, Michigan?
A. Correct.

* * * * * * *

Q. What was your last transaction, or what was the last transaction you participated in, in any brokerage account?
A. Over two years ago.
Q. What account was that?
A. My own.
Q. Did you maintain that account in your own name?
A. It was my own account, but not in my name.
Q. In whose name was it maintained?
A. J. Feldman.
Q. With whom did you maintain these accounts?
A. With Munz, Winslow & Potter.
Q. Where are they?
A. New York City.
Q. There is no doubt, Mr. Feldman, that the equity in that account was entirely your own?
A. There was never a penny in the account, and it shows an eight thousand dollar loss which still remains on the books.
[fol. 1606] Q. That account was for and on your own behalf, exclusively, was it not?
A. If there were any profits, it would have been mine.
Q. So that no one else had any interest in that account?
A. Correct.
Q. Did you maintain any other accounts in the name of J. Feldman in New York at any time?
A. Never.
Q. What other brokerage accounts did you have at or about that time?
A. None.
Q. What other accounts did you have prior to that time?
A. None.
Q. Outside of this account with Munz, Winslow & Potter, did you have any account at any time in any name?
A. In what years?
Q. Any number of years.
A. Yes, I maintained an account in the name of Joe Little.
Q. With whom did you maintain the account in the name of Joe Little?
A. Munz, Winslow & Potter.

Q. At what time?
A. About three years ago.
Q. What other accounts did you maintain?
A. I had none.

• • • • • • •

Q. Do you maintain now, or have you maintained within the past few years, any safe deposit box in your own or any other name?
A. Never.

• • • • • • •

Q. Have you ever made deposits in the account of J. Feldman in the First National Bank?
A. Never made a deposit.
Q. Have you ever caused a deposit to be made in that account through the medium of another person?
A. Yes.
[fols. 1607-1612] Q. Through whom did you cause these deposits to be made?
A. They were made by the office.
Q. What office?
A. J. Feldman.
Q. I take it then that you forwarded money or checks or negotiable paper of some sort to J. Feldman in Petosky, by him to be deposited in the account of J. Feldman,—is that correct?
A. Yes.
Q. Isn't it a fact, Mr. Feldman, that your entire income through all these years has been from funds received from the account in Petosky?
A. No.
Q. Hasn't that been substantially the source of all of your funds?
A. I have been borrowing money over a period of eight years from friends.
Q. Have you borrowed any substantial sums from these friends?
A. Small amounts.
Q. Outside of these borrowings in small amounts you have had no other source of income other than the account in Petosky, Michigan?
A. And what money I made on the sale of furs.

Q. What moneys did you make on such sales?
A. I have no record.

. . . . . .

[fol. 1613] GOVERNMENT'S EXHIBIT 100

CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

In the Matter of Supplementary Proceedings

HEARST HOTELS CORPORATION, Judgment Creditor,

against

SAM FELDMAN, Judgment Debtor.

Parties appear by:

Manheim Rosenzweig, Esq., for Judgment Creditor; William Meyerson, of Counsel. Sam Feldman, Judgment Debtor in person.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, ss:

Direct examination of SAM FELDMAN, judgment debtor in the above entitled proceeding, by judgment creditor's counsel, held the 28th day of October, 1936.

the said SAM FELDMAN, having been duly sworn, testifies as follows:

1. Q. Where do you live?
A. Essex House; 160 Central Park South.
[fol. 1614] 2. Q. How much rent do you pay at the Essex House?
A. $250.00 per month.

. . . . . .

4. Q. Do you live in that apartment alone?
A. I share the apartment with someone.
5. Q. Who pays the rent at the apartment?
A. I pay it in the form of cash.
6. Q. Where do you get the money to live on?
A. I borrow money from different friends of mine and I get help from my father, brothers and sisters, who are fairly wealthy.

7. Q. Do you have any source of income?
A. I have no income whatsoever.

8. Q. Have you a bank account?
A. I had one for the last year and a half at the Emmet County State Bank, Harbor Springs, Michigan, which was closed out about two weeks ago.

9. Q. How big a balance did you carry at that bank?
A. $13.00.

10. Q. Are there any other judgments against you?
A. About 125 that I know of.

11. Q. How much do you owe?
A. About $340,000.

. . . . . .

14. Q. Does your father live in New York City?
A. No, Petoskey, Michigan. He comes to New York and lives with me quite often.

15. Q. Does the rest of your family live there too?
A. In Petoskey, Michigan.

[fol. 1615] 16. Q. Are you still in the fur business?
A. It's been so bad of late, that I've practically given up all fur contacts.

17. Q. Have you any immediate prospects of income?
A. I have nothing to look forward to at the present time, and I contemplate going back to Petoskey, Michigan, if I don't get some source of income shortly.

. . . . . .

19. Q. Have you any jewelry?
A. None.

20. Q. I suppose you've been asked all the customary questions about stocks, bonds, etc.?
A. I have nothing; no money of any kind; no money coming to me from anybody.

———.

Sworn to before me this — day of October, 1936.

———.

[fol. 1616] GOVERNMENT'S EXHIBIT 101

CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

In the Matter of Supplementary Proceedings

HEARST HOTELS CORPORATION, Judgment Creditor,

against

SAM FELDMAN, Judgment Debtor.

EXAMINATION IN SUPPLEMENTARY PROCEEDINGS OF JUDGMENT-DEBTOR, SAM FELDMAN, THIS 6TH DAY OF SEPTEMBER, 1939

STATE OF NEW YORK,
County of New York, ss:

SAM FELDMAN, judgment-debtor, having first been duly sworn, for this, his examination in supplementary proceedings, testifies as follows:

By Mr. Meyerson:

Q. Is your full name Samuel Feldman?
A. Harry is my middle name.

* * * * * * *

Q. When have you last been employed?
A. I have never been employed for the last fifteen years.
Q. When were you last engaged in business of any kind?
A. I am still engaged in the fur business * * * but [fol. 1617] there has been none for the last year that I have been able to do.
Q. Where do you maintain this fur business you are engaged in?
A. I have no place. I go around from one house to another whenever I have orders to fill.
Q. When you say "orders" you mean from retail customers?
A. From individual customers.
Q. Will you explain what this business consists of?
A. When the fur business was good, different individuals who might know me, or who have been recommended to me, would get in touch with me and inquire about a certain fur article they may be interested it. I, in return, then try to bring them down to a certain manufacturer who might

make that particular article. I would have 10% to 15% on the sale of the fur, giving them the benefit of a wholesale price.

Q. With what houses in particular do you deal with?

A. My activities within the last three or four years were with a firm by the name of A. Walzer & Sons, 330 7th Avenue.

Q. Is that all you do in the fur business—getting customers and try to make a sale?

A. That is all I do in the manufacturing line. I then many times sell my father's raw furs, which he ships to New York.

Q. Where is your father's business?

A. Petoskey, Michigan.

Q. Are you informed of all shipments of raw furs to New York City by your father?

A. No, only when he does not make a sale direct does he ask me to help consummate a deal.

Q. Do you act as New York representative for your father?

A. No, only as a son willing to help his father.

[fol. 1618] Q. When have you last handled a transaction for your father?

A. I helped handle a transaction two months ago when he was here.

Q. How much was involved in that transaction?

A. Around $300.

Q. Does you father's firm maintain any other agency or branch in New York City?

A. He has no agency or branch here. This is the direct market, and that is why he ships here.

Q. He has no direct representative in New York City?

A. None.

Q. You are never paid by him?

A. Never received any moneys. Of course, when I wish to borrow money, he doesn't refuse me. He has been paying my rent direct to the Navarro Hotel for the last two and one-half years.

Q. Prior to this transaction of a few months ago, when did you have another transaction for your father?

A. Around the holidays.

Q. You mean Christmas time?

A. Yes.

Q. One transaction, or many?
A. One transaction.
Q. How much was involved on that occasion?
A. Around $600.

• • • • • • •

Q. Have you any interest of any kind in A. Walzer & Sons?
A. None whatever.
Q. Have you any interest in your father's concern?
A. No. The name of the firm is just "J. Feldman".
Q. Has your brother an interest in that firm?
A. He did have until the firm of J. Feldman & Sons was dissolved.
Q. Prior to the dissolution of J. Feldman & Sons, did you also have an interest in it?
A. Never had an interest in it.

• • • • • • •

[fol. 1619] Q. Did you file an income tax return for 1938?
A. Yes.
Q. What earnings did you list?
A. None.

• • • • • • •

Q. As I understand it, your father pays your rent at the hotel?
A. For two and one-half years or more.
Q. Also, I assume he has been paying your other incidental expenses?
A. I have been borrowing from the rest of my family for incidental things.

• • • • • • •

Q. Does anybody owe you any money?
A. No.

• • • • • • •

Sam Feldman.

Sworn to before me this 6th day of October, 1939.

[fol. 1620] GOVERNMENT'S EXHIBIT 102-A

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on April 13, 1937 and June 11, 1937, and sworn to July 21, 1937)

[Page 12]

Q. Are your paid up to date in your obligation to the Essex House?
A. No, sir.
Q. Are you indebted to them?
A. Yes, sir.
Q. For how much?
A. Twenty-six hundred ($2,600.) Dollars.
Q. Are there any other judgments against you?
A. About one hundred and fifty.

Examination adjourned to May 12th, 1937.

[Page 46]

Examination by Mr. Bushel:

Q. Did you say something about going into bankruptcy?
A. Yes, I am going into bankruptcy.
Q. When did you decide to go into bankruptcy?
A. I have had it in my mind a long time. I decided last night, but today I am convinced that I intend to.
Q. I suppose you intend to disclose all your assets?
A. I have no assets.

[fol. 1621] GOVERNMENT'S EXHIBIT 102-B

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on June 11, 1937 and sworn to July 21, 1937)

[Page 40]

Q. How often does your father send you checks?
A. Sends me a book about once a month.
Q. And this book is signed by your father?
A. Yes.
Q. How do you get it?
A. By mail.

[Page 41]

Q. Now, did you send any money to your father today?
A. I did.
Q. By Western Union?
A. Yes.
Q. What office?
A. 58th Street and Six Avenue.
Q. How much did you send?
A. $3,500.
Q. And you got a receipt from the Western Union?
A. Yes.
Q. What time of the day was it that you sent this money?
A. 1:00 o'clock.
Q. Did you send any other money to your father today?
A. No.
Q. How about yesterday, June 10th?
A. No. June 7th $3,000.
Q. What office?

[Page 42]

A. Same office.
Q. What did you do with the receipt
A. Tore it up.
Q. How soon after you got it?
A. Right after I got it.
Q. What is your purpose in tearing up these receipts?
A. Not to have people know what I am doing.
Q. You did not get a verification from your father?
A. I got no verification from my father.

[fol. 1622] GOVERNMENT'S EXHIBIT 102-C

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on June 11, 1937 and sworn to July 21, 1937)

[Page 26]

Q. Have you sent any money by Western Union during the last year?
A. Yes.
Q. Will you state when and the amounts and where you sent it?
A. I have no record of it.
Q. To whom did you send money by Western Union for

[Page 27]

the last year?

A. A. J. Feldman, Petosky, Michigan.

Q. You sent money to him by Western Union, and from where did you send it?

A. From different Western Union offices.

Q. And how often do you send money to Michigan?

A. Real often.

Q. Every week?

A. Yes.

Q. Do you know how much you sent during the last year?

A. No.

Q. How much did you send during the month of June, up to June 11, 1937?

A. $15,000 to $20,000.

Q. Who is J. Feldman?

[Page 28]

A. My father.

Q. From June 1, 1937 to June 11, 1937 you sent your father by Western Union $15,000. or $20,000?

A. Correct.

Q. Where did you send this money from. What office?

A. Different offices.

[fol. 1623] Q. Give me the offices you recollect?

A. Most of it from 58th Street and Sixth Avenue.

Q. Where else?

A. Down around 32nd Street and 7th Avenue.

[Page 29]

Q. Where else?

A. That is all.

Q. Where did you get this $15,000. or $20,000?

A. By cashing my father's checks.

Q. Please explain that? What do you mean by cashing your father's checks?

A. I happened to be terribly in debt in the vernacular. I am taking advantage of my father's credit by "kiting" his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his.

Q. What do you mean by that? I don't understand that.

A. In other words, I am "kiting." I am about $6,000. in debt, and I cashed his checks from time to time, and wire the money to him to make the checks good that I have

already cashed until such time as I can borrow the money to make good the last one.

Q. How does your father send you these checks?

A. By mail.

Q. For what purpose?

A. Knowing that I am in difficulty, and trying to be a dutiful father, and help me out.

Q. These checks are on what bank?

A. First National Bank, Petoskey, Michigan.

[Page 30]

Q. Have you a power of attorney from your father?

A. It is not at all necessary because the checks are signed by him.

[fol. 1624] Q. Have you a power of attorney executed by your father?

A. No.

Q. How much did you receive from your father from June 1 to June 11, 1937?

A. He sends me blank checks signed. I use them as I see fit.

Q. To pay your obligations?

A. I am still involved.

Q. In other words, your father sends you blank checks signed by him?

A. Yes.

Q. The name of the payee blank?

A. Yes.

Q. How is the check signed?

A. J. Feldman.

Q. And then you make out the check for any amount you want?

A. Yes, sir.

Q. You fill in the date?

[Page 31]

A. Yes, sir.

Q. From June 1 to June 11, 1937 you paid certain obligations with the moneys that you received?

A. I have been overdrawn.

Q. Did you pay any of your indebtedness with the checks that you received from your father during the month of June, 1937?

A. I paid the hotel.

Q. How much?
A. I paid them $1,100. on account.
Q. On account of what?
A. Of indebtedness.
Q. Representing what?
A. Cash advanced, about $900., the balance for sundries.
Q. During what period of time did the Essex house advance you $900.?
A. Over a period of six weeks.
Q. How much did they advance you from June 1 to June 11?
A. $500.
Q. What date in June?
A. Today.
Q. What did you do with the money?
A. Wired it to my father.
[fol. 1625] Q. When in May did the Essex House advance

[Page 32]

you the money?
A. Different times.
Q. What did you do with the money?
A. Wired it to Petoskey.
Q. What business is your father in?
A. Hides, furs, wool.
Q. Let me ask you this question. How much do you owe the Essex House at the present date?
A. About $2,800.
Q. Do you get cash from the Essex House any time you want?

[Page 33]

A. Only on a new account.
Q. What do you mean on a new account?
A. There is an old account set aside there for about $2,200. That is now shown on the new account.
Q. Under what name was the old account?
A. Same name—Sam Feldman.
Q. What is the name of the new account?
A. Sam Feldman.
Q. What do you mean old account and new account?
A. Because it is under new management.
Q. How much do you owe them in the new account?
A. About $850.

Q. And the old account you owe how much?
A. About $2,000.

[Page 35]

Q. Mr. Feldman, you told me a minute ago, when I saw you in the library of this office conferring with your at- [fol. 1626] torney, that you were going to file a petition in bankruptcy. Is that correct?
A. Yes.
Q. Did you tell me at that time which was about five minutes ago that you were going to file a petition in bankruptcy?
A. I said I am compelled to.
Q. You said to me that you are going to file a petition in bankruptcy?
A. Yes.
Q. When are you going to do that?
A. Immediately.
Q. Where?
A. I don't know.
Q. Didn't you a little while ago say to me in Michigan?
A. That is my contemplation.

[Page 36]

Q. Did you make that statement to me?
A. Yes.
Q. You say Mr. Feldman that you are heavily in debt?
A. Tremendously.
Q. Still you pay $250. a month?
A. Yes.
Q. For how long have you been living at the Essex House paying $250. a month?
A. Eight months.
Q. Has that been a continuous tenancy at the Essex House for the past eight months?
A. Yes.
Q. You have been paying $250. a month. Have you occupied the same apartment?
A. Yes. 3501.
Q. Prior to the last eight months you resided at the Essex House?
A. Yes, in a single room.
Q What was the apartment?
A. I don't recall. The third floor.

Q. How long did you occupy that?
A. Two years, at $75, per month.

[fol. 1627] GOVERNMENT'S EXHIBIT 102-D

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on July 9, 1937 and sworn to July 21, 1937)

[Page 69]

Q. You have been doing an awful lot of calling to your father. He is from Petoskey? You have called him every day?
A. Was compelled to.
Q. He did not reverse any charges did he?
A. No, but he paid for all the 'phone calls of last month.
Q. How did he pay for them?
A. By check.
Q. Whose check?

[Page 70]

A. J. Feldman signed the check.
Q. Who filled out the check?
A. I did.
Q. It is the same kind of checks that you have been "kiting"?
A. I object to that.
Q. Didn't you use the word "kiting"? Didn't you yourself use that word?
A. That is the real term for it, but I don't recall using the word. If that is what you want all right. You shouldn't be so nasty. You are making me look like a burglar.

[fols. 1628-1639] GOVERNMENT'S EXHIBIT 102-E

(Excerpts from Examination of Samuel H. Feldman in Supplementary Proceedings taken on July 9, 1937 and sworn to July 21, 1937)

[Page 71]

Q. Didn't you send all this money that you were wiring

[Page 72]

to make good checks?

A. "Kiting" as you mention it, and have been doing it for seven months.

[Page 73]

Is there anything you can recollect to help your creditors find out where your money is?

A. I have no money.

[fol. 1640] In United States District Court, Southern District of New York

Index No. C 108-159

United States of America, Appellee,

against

Samuel H. Feldman, Defendant-Appellant

Notice of Appeal and Grounds

Name and Address of Appellant: Samuel H. Feldman, Hotel Navarro, 112 Central Park South, Borough of Manhattan, City of New York.

Name and Address of Appellant's Attorney: Seymour M. Klein, Esq., 150 Broadway, Borough of Manhattan, City of New York.

Offense: Violation of Section 338 of Title 18 of the U. S. C. A. (Mail Fraud).

Date of Judgment: July 9th, 1942.

Brief Description of Judgment or Sentence: Five years' imprisonment on Counts 1, 3, 5, 6 and 8. The sentence is to run concurrently. Directed verdict in favor of the defendant on Counts 2 and 4. Five years' probation at the end of the prison term on Counts 7 and 9.

[fols. 1641-1643] Name of Prison Where Appellant is Now Confined: Appellant is at present confined at the Federal House of Detention, 11th Street, Borough of Manhattan, City of New York.

I, the above-named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals, for the Second Circuit, from the judgment above mentioned on the grounds set forth below.

Dated, New York, July 10th, 1942.

Samuel H. Feldman, Defendant-Appellant.

GROUNDS OF APPEAL

. . . . . .

[fol. 1644] 18. The Court erred in admitting evidence of defendant-appellant's testimony in supplementary proceedings before various courts of the State of New York, which testimony was compulsory and the admission of which was in violation of defendant-appellant's constitutional rights, to which exception was duly taken.

. . . . . .

[fol. 1645] 24. The Court erred in instructing the jury as to the legal effect and rights and obligations arising thereunder of certain New York State Statutes which will be more fully hereinafter described in the Assignment of Errors, and as to which the defendant-appellant duly excepted.

. . . . . .

[fol. 1646] 30. That the constitutional rights of the defendant-appellant were violated during the course of the trial, and to which the defendant-appellant duly excepted.

The foregoing grounds of appeal are not intended and are not to be construed in any way to limit or define the scope of the Assignment of Errors to be hereinafter filed.

Marshall, Bratter & Seligson, Attorneys for Defendant-Appellant, Office & P. O. Address, 150 Broadway, Borough of Manhattan, City of New York.

[fols. 1647-1654] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff-Respondent,

against

SAMUEL H. FELDMAN, Defendant-Appellant

ASSIGNMENT OF ERRORS

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which he will rely in his prosecution of the appeal from the judgment made by this Honorable Court on the 9th day of July, 1942.

. . . . . .

[fols. 1655-1658c] XIX. The United States District Court erred in admitting into evidence defendant's testimony in supplementary proceedings and parts of such testimony taken before various courts of the State of New York, which was erroneously and improperly admitted and was in violation of the defendant's constitutional rights, to all of which exception was duly taken (pages 1234 to 1273; 1026 to 1029; 1463-1466; Exhibits 95 at page 1588, 95A at page 1597, 95B at page 1604, 100 at page 1613, 101 at page 1616, 102A through E at pages 1620 to 1628).

. . . . . .

[fols. 1658d-1664] XXXI. The constitutional rights of the defendant were violated during the course of the trial, to which the defendant duly excepted.

Wherefore, the appellant prays that the said judgment and sentence be reversed and the indictment be dismissed, or that a new trial be granted and that the Court grant such other and further relief as it see fit.

Marshall, Bratter & Seligson, Attorneys for Appellant,

Seymour M. Klein, Of Counsel.

[fol. 1665] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT—October Term, 1942

No. 180

(Argued February 9, 1943 Decided June 8, 1943)

UNITED STATES OF AMERICA, Appellee,

v.

SAMUEL H. FELDMAN, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

The appellant was convicted of using the mails for the purpose of executing a scheme to defraud, 18 U. S. C. §338. Judgment affirmed.

Before Swan, Augustus N. Hand, and Clark, Circuit Judges

Marshall, Bratter & Seligson, Attorneys for Appellant; Seymour M. Klein, of Counsel; Ruth F. Rosenthal and Harry L. Wechsler, on the Brief.

Mathias F. Correa, United States Attorney, for Appellee; Frederick H. Block, Peter J. Donoghue and Thomas K. Fisher, Assistant U. S. Attorneys, of Counsel.

[fol. 1666] SWAN, Circuit Judge:

The appellant was prosecuted upon an indictment of nine counts, each of which charged a scheme to defraud and a use of the mails in furtherance thereof, in violation of section 215 of the Criminal Code, 18 U. S. C. § 338. Seven of the counts were left to the jury. The appellant was found guilty on all of them and was sentenced to imprisonment for a term of five years.

The fraudulent scheme charged in the indictment was the "kiting" of checks. Such a scheme when the maker knows that he has no prospect of paying the checks and uses the mails in furtherance of his scheme is a violation of the mail fraud statute. *Federman* v. *United States*, 36 F. 2d 441 (C. C. A. 7), cert. den. 281 U. S. 729; *Lowe* v. *United States*, 115 F. 2d 596, (C. C. A. 7), cert. den. 311 U. S. 717; see also *Charles* v. *United States*, 213 F. 707 (C. C. A. 4).

The proof showed that in August 1936 Feldman caused a small checking account to be opened in the name of "J. Feldman," his father, in a bank in Petoskey, Michigan. Then, operating in New York with blank checks signed by the father, he would fill in the amounts and the names of payees and would present the checks to various persons to be cashed, knowing that the funds on deposit were insufficient to meet the checks and that neither he nor his father had the financial means to pay them. During the first eight months of 1937 a mounting series of such checks were cashed, frequently by the Essex House, where Feldman rented an apartment. Knowing that it would take four or five days for the checks to be cleared through the Petoskey bank, he would present and cash additional checks and telegraph money to pay the checks previously issued. On August 20, 1937, when the managing director of the corporate owner of the Essex House learned of the check kiting,

[fol. 1667] the J. Feldman account in the Petoskey bank had on deposit 24 cents, while the outstanding checks which Essex House had cashed between August 16 and 20, inclusive totaled $30,700. During the period from January to August inclusive, the appellant had telegraphed to the Petoskey bank more than $860,000 to cover checks previously cashed. When confronted by the attorney for Essex House with a demand that he take care of the outstanding $30,700 of checks, he said that neither he nor his father could pay them. Nevertheless on August 21st he telephoned a young man named Reynolds, who mailed him a number of checks signed in blank drawn on Reynold's account in a bank at Dayton, Ohio. Reynolds told the appellant that he had no money in the account and that the checks were not to be cashed unless the appellant sent the money to cover them. Disregarding this, the appellant filled in and cashed checks on Reynolds' account and thereby obtained the money to take up the outstanding Essex House checks. The fact that the latter were paid is no defense, since it is immaterial whether the unlawful scheme succeeds in actually defrauding an intended victim. *Foster* v. *United States*, 178 F. 165 (C. C. A. 6); *United States* v. *Rowe*, 56 F. 2d 747, 749 (C. C. A. 2), cert. den. 286 U. S. 554; *Baker* v. *United States*, 115 F. 2d 533 (C. C. A. 8), cert. den. 312 U. S. 692, rehearing den. 312 U. S. 715.

The Reynolds checks were protested. Thereupon Reynolds, accompanied by his financee, his mother and his mother's attorney, came to New York and interviewed Feldman, who told them he was "broke" and could not pay. Later he gave Mrs. Reynolds notes to cover the money she advanced to make her son's checks good, but these were never paid.

The mailings charged in the several counts of the indictment occurred in August 1937. Two relate to checks cashed by Essex House, the other five to the Reynolds transaction.

[fol. 1668] Nevertheless a very large part of the voluminous record consists of evidence concerning the appellant's resumption of kiting checks drawn on the J. Feldman account and cashed by Stout & Company between September 1938 and April 1939. There was also testimony as to transactions with Emanuel & Co. in 1930. Most of the errors in the conduct of the trial of which the appellant complains relate to these "similar transactions" which were relevant only on the issue of the appellant's fraudulent intent in the check kiting to which the mailings related. Why the government thought it necessary or desirable so greatly to lengthen the trial by the introduction of a mass of evidence relating to similar transactions we find difficult to understand in view of the completeness of its proof as to the Essex House and Reynolds transactions. Indeed the appellant's fraudulent intent was proved out of his own mouth by the introduction of testimony given by him in supplementary proceedings conducted by judgment creditors in courts of the State of New York. In these examinations he stated under oath that there were about 150 judgments against him representing an indebtedness of nearly $350,000; that he had no business and no source of income, was living on money borrowed from family and friends, and was contemplating bankruptcy. He even explained the precise scheme with which the indictment charged him, saying "I am taking advantage of my father's credit by 'kiting' his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his. • • • I cashed his checks from time to time, and wire the money to him to make the checks good that I have already cashed until such time as I can borrow the money to make good the last one," folio 4868. "He sends me blank checks signed. I use them as I see fit," folio 4870. "'Kiting' as you mention it, and have been doing it for seven months. • • • I have no money," folio 4883. He also admitted tearing up Western Union receipts for money wired to his

[fol. 1669] father, his purpose being "Not to have people know what I am doing," folio 4863. These excerpts are from examinations sworn to in July 1937; that is, during the very period covered by the indictment. Several of them were stressed in the government's summation. With this evidence before the jury a verdict of guilt was inevitable.

The appellant did not take the stand to testify in his own behalf. He objected to the admission of his examinations in supplementary proceedings as a violation of his constitutional privilege under the Fifth Amendment not to be compelled to be a witness against himself. If the objection was well taken the judgment must be reversed; if it was not well taken the appellant's guilt is so clearly established that other alleged errors in the conduct of the trial may well be disregarded as non-prejudicial.

Under the law of New York a judgment debtor can be compelled to give testimony concerning his affairs and cannot refuse to answer on the ground of self-incrimination since his testimony cannot be used against him in a state prosecution. N. Y. Civ. Prac. Act § 789 (formerly § 791); *People* v. *Carlson*, 222 App. Div. 54. Although Feldman did not claim immunity under the Fifth Amendment on the ground that his answers might subject him to a federal prosecution, his counsel argues that such a claim could not have prevailed had it been made. *Jack* v. *Kansas*, 199 U. S. 372.* Consequently it is urged that the first opportunity Feldman had to claim his constitutional privilege was when his examinations in supplementary proceedings were offered in evidence, and he then did so. The argument assumes that the constitutional privilege operates to render

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* Similarly a witness compelled to testify under a federal statute cannot assert a privilege against self-incrimination under state law. *Brown* v. *Walker*, 161 U. S. 591; *United States* v. *Murdock*, 284 U. S. 141.

[fol. 1670] inadmissible in a federal prosecution testimony given under a threat of judicial compulsion in litigation in a state court. No controlling authority has been cited for this proposition. *Clark* v. *State*, 68 Fla. 433, the only case relied upon by the appellant, presents the converse of the situation at bar. There testimony which the defendant had given in a bankruptcy proceeding was put in evidence against him in a state prosecution for embezzlement. Without discussion of the problem the opinion held this to be a violation of a provision in the state constitution which is the counterpart of the federal privilege under the Fifth Amendment. We are not convinced that this decision should control determination of the case at bar. In *Johnson* v. *United States*, 228 U. S. 457, the defendant was convicted upon an indictment for concealing money from his trustee in bankruptcy. His books, title to which passed by operation of law to his trustee, were used against him. In affirming the conviction Mr. Justice Holmes remarked "A party is privileged from producing evidence but not from its production." In *United States* v. *Murdock*, 284 U. S. 141, the defendant was indicted for refusing to answer questions propounded by an internal revenue agent concerning deductions claimed in the defendant's income tax returns. His refusal was based on the claim that his answers might incriminate him under state law. In discussing his claim of privilege the court said at page 149:

> "The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. King of the Two Sicilies v. Willcox, 7 St. Tr. (N. S.) 1050, 1068; Queen v. Boyes, 1 B. & S. 311, 330. This court has held that immunity against state prosecution is not essential to the validity of

[fol. 1671] federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. Counselman v. Hitchcock, 142 U. S. 547, Brown v. Walker, 161 U. S. 591, 606. Jack v. Kansas, 199 U. S. 372, 381. Hale v. Henkel, 201 U. S. 43, 68. As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained."

Similarly, in *Hale* v. *Henkel*, 201 U. S. 43, at 69, the English rule was stated approvingly thus: "* * * the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty." We are, therefore, of opinion that the testimony Feldman gave in the supplementary proceedings was competent evidence against him.

It seems surprising that neither the researches of counsel nor those of this court have uncovered any precise authority. The government contends that the question was passed upon by our decision in *Vause* v. *United States*, 53 F. 2d 346, 356, cert. den. 284 U. S. 661. There the defendant Schuchman was cross examined relative to testimony he had given in supplementary proceedings under § 791 of the New York Civil Practice Act. But that decision goes no further than to hold that such testimony may be used on cross examination when the defendant under prosecution waives his privilege by taking the stand. *Cf. Raffel* v. *United States*, 271 U. S. 494, 497; *United States* v. *Buck-*

[fol. 1672] *ner*, 108 F. ed. 921, 929 (C. C. A. 2), cert. den. 309 U. S. 669; *United States* v. *Mortimer*, 118 F. 2d 266, 268 (C. C. A. 2), cert. den. 314 U. S. 616. Possibly the absence of readily discoverable authority may be explained by the existence from 1868 until its repeal in 1910 of § 860 of the Revised Statutes This provided:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The fact that such a statute was thought necessary tends to support our conclusion that in the absence of a federal statute testimony obtained in litigation in a state court is competent evidence in a federal prosecution. See *United States* v. *Hughes*, 12 Blatch. 553, 559; *Czarlinsky* v. *United States*, 54 F. 2d 889, 893 (C. C. A. 10), cert. den. 285 U. S. 549; *Johnson* v. *United States*, 163 F. 30, 32 (C. C. A. 1).

Moreover, even if the federal privilege against self-incrimination extended to compulsory testimony in state courts, the record here fails to show wherein the appellant suffered prejudice. The admissions sworn to in July, 1937 (excerpts from which appear above) were, of all his statements, both the most damaging in content and the closest in point of time to the mailings charged in the indictment. Yet these were plainly admissible, because the defendant could not have had a privilege in July against testifying as to a crime he did not commit until August, and because

[fol. 1673] the federal authorities, by delaying the indictment till the statute of limitations had run on offenses committed prior to August 1937,* gave him the immunity against prosecution which has been held equivalent to the constitutional privilege. *Brown* v. *Walker*, 161 U. S. 591. See *Hale* v. *Henkel*, 201 U. S. 43, 67. Once there had been admitted these declarations that he had no funds and that he had kited checks, his much later statements of October 1938 to September 1939 became mere cumulative reiteration of matters already abundantly proved, and cannot have had any substantial effect on the jury's verdict.

Error is alleged in the admission of evidence concerning transactions with Emanuel & Co. in 1930. It is urged that these transactions were too remote in time and too dissimilar in character. Emanuel & Co. was a stock brokerage concern with which the appellant had an account and to which he gave a $50,000 draft drawn on one Heller who had neither any obligation nor any funds to meet it, as Feldman knew. We regard the transaction as sufficiently similar in character to be admissible on the issue of intent. See *United States* v. *Seeman*, 115 F. 2d 371, 373 (C. C. A. 2). But it was so remote in time that it might well have been excluded. However this is a matter in which the trial judge should be allowed a wide range of discretion. *United States* v. *Shurtleff*, 43 F. 2d 944, 948 (C. C. A. 2); *Mayer* v. *People*, 80 N. Y. 364, 373. With respect to a "similar transaction," the more remote it is in time, the less compelling is its probative value on the issue to be tried. Even if we were prepared to find error in the admission of evidence of transactions which occurred six years before the mail fraud charged in the indictment, we are not convinced that it was

* The indictment was filed Aug. 20, 1940. The applicable limitation is three years. 18 U. S. C. § 582.

[fol. 1674] so prejudicial as to require a reversal of the judgment in a case where guilt was so clearly proved.

Complaint is also made with respect to restrictions upon the cross-examination of Goetz and Miller, partners of Stout & Company, who were called as witnesses by the prosecution. During some six months in 1938 and 1939 the appellant kited checks which were cashed either at the New York office or at the Florida office of Stout & Company. Goetz and Miller gave testimony tending to prove that they were victims of the appellant's misrepresentations as to his checks being good or his ability to make them good. The defense attempted to show that the partners gave accommodation to Feldman for business reasons, knowing that the funds in his bank account were insufficient to meet his checks. Stout & Company carried insurance which would have protected them against losses resulting from fraud of the sort charged against Feldman. On cross-examination his counsel attempted to inquire into prior statements, declarations and conduct of Goetz and Miller with reference to making a claim upon the insurance policies that were inconsistent with their testimony. The trial court's rulings prevented such inquiry. This was erroneous. Prior statements that the partners did not consider themselves to have been defrauded would have been inconsistent with the testimony that "in the beginning" they cashed Feldman's checks believing them to be good (fol. 2385). Such statements were admissible to discredit their testimony. *Wigmore, Evidence*, 3rd ed. § 1041; see *Judson* v. *Fielding*, 227 App. Div. 430, aff'd 253 N. Y. 596; *Pierce* v. *Sanden*, 29 F. 2d 87, 90 (C. C. A. 8). Similarly, evidence as to their conduct with respect to the insurance investigation and claim was competent, for "a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the

[fol. 1675] fact." *Wigmore, Evidence*, 3rd ed. § 1042; see *Barrett* v. *N. Y. C. & H. R. R. R. Co.*, 157 N. Y. 663, 670; *Lilly* v. *Hamilton Bank*, 178 F. 53, 59 (C. C. A. 3). But again we are satisfied that these errors could not have affected the jury's verdict.

We find no error in the charge. Other objections to the conduct of the trial are deemed too trifling to merit discussion. Indeed the defendant's guilt was so overwhelmingly established that only a most glaring error could be prejudicial.

Judgment affirmed.

CLARK, Circuit Judge (dissenting):

The present is one of those disturbing cases where the conduct of the defendant is most unattractive, to put it mildly; and yet there was real doubt whether he had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished. I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial, particularly in view of the natural prejudice which defendant's conduct tended to inspire. But that care was not exercised.

The defense centered on the point that the various persons who cashed the checks for defendant knew what he was up to and assisted him knowingly. Although I agree that even on this issue there was sufficient evidence to take the case to the jury, my view as to the substantial character of the trial court's errors is necessarily influenced by my own conclusion that the affirmative evidence of knowledge was strong. Certainly agents of the Essex House had it, and the only question here is how far the higher-ups in that organization remained in ignorance notwithstanding the

[fol. 1676] sizable amounts of these daily transactions. Again there can be no question but that Goetz and Miller had knowledge at some time while the practice continued; the only question is whether for a period one of them at least lacked it. Hence cross-examination of these witnesses as to their prior statements, declarations, and conduct was highly important and significant. Refusal to permit such examination was, therefore, clearly erroneous, as the opinion points out. In view of the importance of this evidence on the most vital issue of the case, I think this ruling alone would require reversal.

As to Reynolds, defendant appealed to him for checks signed in blank, in order to get out of the jam he was in, and Reynolds naively complied. What would he have sent the checks for except that they might be used to bolster defendant's shaky financial condition? Perhaps here, too, there was evidence for the jury, although it points more in the direction of a violation of agency instructions than an intent to defraud by mail. At any rate, the evidence being thus equivocal, errors in the trial become the more important.

Under all the circumstances, I would find error not only in the limitation of cross-examination of Goetz and Miller already referred to, but also in the action taken with respect to the other two matters particularly considered in the opinion as well as in the conduct of the trial generally. The question of use in the federal courts of defendant's examination in the state supplementary proceedings, absolutely privileged on a state prosecution, is, as the opinion shows, not settled. I believe, however, that *Clark* v. *State, supra,* states the better rule, unless we definitely wish to trap persons between the interstices of the overlapping state and federal sovereignties. Cases such as *United States* v. *Murdock, supra,* show merely that defendant could not have refused to answer in the state proceedings; they do not hold

[fol. 1677] that the immunity promised him can be substantially nullified by the wide scope of the federal mail fraud and conspiracy statutes. In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the statute of limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those "civilized standards of procedure and evidence" required by *McNabb* v. *United States*, 63 S. Ct. 608, 613.

As to the proof of the similar Emanuel transactions many years earlier, of course the admissibility of such evidence should generally be within the discretion of the trial court; but if I am correct that the case was so close on the showing of both an intent to defraud and a defrauding, then this long outdated evidence might well have been enough to turn the scales against defendant.

There were other details of the trial which I find disturbing, in view of this condition of the evidence. These included such matters as the different treatment of defense and prosecution counsel, the former being required to state his proposed testimony at length in chambers, to be there ruled out for the most part, while the latter was allowed to present his claims as usual in the courtroom before the jury; or the allowing of an inference against defendant for not calling Mrs. Reynolds' Florida lawyer to rebut a self-serving reference by her on the witness stand; or as to errors in the charge clearly made, though possibly corrected before the jury retired. Without rehearsing these in detail, I must express my fear that defendant was tried and convicted of general amoral conduct, rather than of specific intent to defraud by mail.

[fol. 1678] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of June, one thousand nine hundred and forty-three.

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

SAMUEL H. FELDMAN, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk, by A. M. Bell, Deputy Clerk.

[fol. 1679] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States of America v. Samuel H. Feldman. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 24, 1943. D. E. Roberts, Clerk.

[fol. 1680] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1681] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question whether petitioner's testimony given in the New York supplementary proceedings was properly admitted in evidence at the trial.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration or decision of this application.

Endorsed on cover: File No. 47,586. U. S. Circuit Court of Appeals, Second Circuit. Term No. 193. Samuel Feldman, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 23, 1943. Term No. 193, O. T., 1943.